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No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

SHERMAN ADAMS, ... Petitioner

vs.

CITY OF SHEPHERDSVILLE,
MAYOR JAMES T. SPARROW and
OFFICER BEN STILLWELL . . Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CONSTITUTIONAL PROVISIONS

The Constitutional provision involved is the freedom of assembly clause of the First Amendment of the Federal Constitution.

> Congress shall make no law . . . abridging . . . the right of people to peaceably assemble.

STATUTORY PROVISIONS

The Statutes involved are 42 USC § 1983

> Every person who, under color of any statute, ordinance, regulation, custom or useage of any state or territory or of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any

rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

and KRS 525.060(1)(d)

A person is guilty of disorderly conduct when in a public place and with intent to cause public inconvenience, annoyance, or alarm, or wantonly creating a risk thereof, he:

. . . Creates a hazardous or physically offensive condition by any act that serves no legitimate purpose.

Supreme Court of the United States

Part V.

JURISDICTION ON WRIT OF CERTIORARI

Rule 17

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI .1(a)(b)(c)

.1 A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of

judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

ARGUMENT

There is but one issue this Court need look to in deciding whether or not to grant this Petition for Certiorari and that is, does it fit within any of the guidelines of Supreme Court Rule 17 or any of the cases decided by this Court in granting this form of relief.

Although Rule 17 does not set forth all grounds for the grant of this relief it gives a rather broad description of areas to be dealt with.

In examining the Petition there is no allegation that the United States Sixth Circuit Court of Appeals rendered a decision in conflict with any other federal court or decided this case in conflict with any state court of last resort.

The only case mentioned by Petitioner is that of *Dennis* v. *Sparks*, 449 U. S. 24 which deals with a conspiracy between various parties, one of which was

acting under color of law but who was imminent from prosecution. In the case at bar the Petitioner was unable to convince the Judge for the Western District of Kentucky that there was any conspiracy between any governmental officials at any time. The Petitioner failed in this presentation so badly that the Court granted a motion for a directed verdict at the close of the Petitioner's proof. (Appendix).

In no way can the Petitioner claim to fall within the jurisdictional guidelines of Supreme Court Rule 17.1(b) for there is no conflict between any state courts of last resort and any federal courts of appeal. This issue was never decided by the Kentucky Supreme Court and therefore any requirement for final action by a state court of last resort can never be met in this case.

As for Supreme Court Rule 17.1(c) there is no new federal issue raised in this action nor does its disposition by the lower court conflict with any prior decision of this Court.

This Court has previously held on numerous occasions that for an action to lie under 42 USC § 1983 there must be some action taken under color of state law.

The only action alleged at trial or in this petition is that James T. Sparrow did on July 20, 1976 sign a criminal warrant alleging the Petitioner violated KRS 525.060(1)(d). Even though the Petitioner at trial had the opportunity to establish this action was under color of state law he was unable to do so.

He has failed at all steps of the judicial process—Shepherdsville Police Court, Bullitt Circuit Court, United States District Court and the United States Sixth Circuit Court of Appeals to show any action by any official which in any way deprived him of any rights, privileges, or immunities secured by the Constitution and laws.

As to the constitutionality of KRS 525.060(1)(d) this issue has not been previously raised and is not raised here. Therefore, it must be believed that Petitioner believes it constitutional and the actions taken under this Statute were then and are now legitimate and legal.

This Court need look no further than the decision of the District Court to see that immunity was not an issue at trial and therefore the alleged loophole seen by the Petitioner did not then or now exist.

The Court has previously stated in *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U. S. 500 at Page 351:

> "certiorari jurisdiction 'is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision'."

The Court also stated in *Rogers (ibid)* at page 530:

> "The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing . . .".

CONCLUSION

This case does not fall within any of the guidelines established by the appropriate rules or case law governing the grant of Certiorari and therefore this Petition should be denied.

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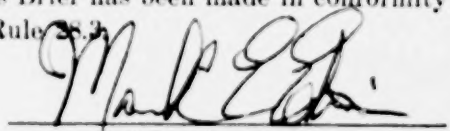
Counsel for Respondents

CERTIFICATE OF SERVICE

This is to certify that three copies of this Brief in Opposition to Petition for Writ of Certiorari have been served upon the Hon. David Murrell and Hon. Rebecca Murrell, Counsels for Petitioner, 3615 Kings Hwy., Louisville, Kentucky 40220. This is to further certify that all parties required to be served have been served by ordinary mail this 10th day of September, 1983, postage prepaid and that service of this Brief has been made in conformity with Supreme Court Rule 28.3.



MARK E. EDISON

APPENDIX

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

No. C 80-0236-L(B)

SHERMAN ADAMS - - - - - - - *Plaintiff*

v.

CITY OF SHEPHERDSVILLE,
MAYOR JAMES T. SPARROW,
OFFICER BEN STILLWELL - - - - - *Defendants*

JUDGMENT—Entered January 12, 1982

For the reasons set forth in the Memorandum filed this date,

IT IS ORDERED that the motion of the defendants, James T. Sparrow, Ben Stillwell and the City of Shepherdsville, for directed verdict be and it hereby is granted and this action be and it hereby is dismissed with prejudice at the cost of the plaintiff.

There is no just reason for delay, and this is a final and appealable Order.

This 12th day of January, 1982.

(s) Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
United States District Judge

Copies to:

Counsel of record

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 80-0236-L(B)

SHERMAN ADAMS - - - - - - - *Plaintiff*

v.

CITY OF SHEPHERDSVILLE,
MAYOR JAMES T. SPARROW,
OFFICER BEN STILLWELL - - - - - *Defendants*

MEMORANDUM—Entered January 12, 1982

This matter came on to be tried before the Court with a jury on January 7 and January 8, 1982. At the conclusion of plaintiff's evidence the defendants moved for a directed verdict, F. R. Civ. P. 50(a) and the Court granted the motion. Since the Court's reasons for granting the motion differ from the reasons presented by defendants in support of their motion, the Court finds it appropriate to set forth the grounds upon which it relied.

FACTS

On November 25, 1980, in a memorandum denying plaintiff's motion for summary judgment, the Court set forth the facts from which this action arose. The Court has also recited the factual background of this controversy in its memorandum granting plaintiff's petition for a writ of habeas corpus. *See Adams* v. *Bullitt County Jailer*, C 79-0572-L(B)(W.D. Ky., 1979). Those memoranda are incorporated herein by reference.

Briefly, it was established at the trial that plaintiff is the leader of the Ku Klux Klan in Kentucky. That organization determined that it should mark the Bicentennial Anniversary of the Declaration of Independence by a parade through the streets of Shepherdsville, a Kentucky community of about 4500 people. At the time of the parade, Saturday, July 3, 1976, Shepherdsville had a police force of four full-time and four part-time officers.

On June 14, 1976, plaintiff and some of his fellow Klansmen appeared before the Shepherdsville City Council, made up of the Mayor, defendant Sparrow, and five councilmen. The Council voted to issue a parade permit. On July 1, 1976, the Council rescinded the permit, reciting what it perceived to be imminent danger of violence. (Both the issuance and rescission of the parade permit were probably nullities, since Shepherdsville has no ordinance requiring parade permits.)

On July 3, 1976, about 200 Klansmen, many robed and hooded and carrying firearms, gathered on a side street in Shepherdsville to form the parade. Defendant Sparrow asked them to disperse. When this request was ignored defendant Stillwell, Chief of the Shepherdsville Police Department, using a bullhorn, ordered the paraders to disperse. This order was no more effectual than the Mayor's request and the parade was held admittedly without incident.[1]

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[1]At trial plaintiff offered the somewhat incredible testimony that members of the black community of Shepherdsville applauded and cheered the parading members of the Ku Klux Klan.

Seventeen days later defendant Sparrow signed a complaint charging plaintiff with a violation of KRS 525.060 (1)(d).[2] A warrant was issued and plaintiff was arrested. He appeared before the Shepherdsville Police Court, presided over by a nonlawyer. He was found guilty and sentenced to 30 days in jail and fined $100.00 plus $12.00 in court costs. The jail sentence, the fine and the costs were "probated".

Plaintiff appealed the conviction to the Bullitt Circuit Court. He was tried by that court with a jury, found guilty and sentenced to 90 days in jail and fined $250.00. Attempted appeals to the Kentucky Court of Appeals and the Supreme Court of Kentucky were dismissed on procedural grounds and on November 2, 1979, plaintiff began service of his jail sentence. As we have noted, this Court granted plaintiff's petition for a writ of habeas corpus and he was discharged on December 21, 1979. This action was filed April 30, 1980. Plaintiff invoked the Court's jurisdiction under Title 42 U.S.C. Section 1983.

The complaint which the defendant Sparrow signed and upon which the warrant was issued, contained no reference to his position as Mayor of Shepherdsville.

DISCUSSION

After hearing the evidence the Court concluded that no violation of Section 1983 could be successfully maintained against Stillwell. The only participation attributed to him was his ineffective order to disperse. Had Still-

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[2]KRS 525.060: (1) A person is guilty of disorderly conduct when in a public place and with intent to cause public inconvenience, annoyance or alarm, or wantonly creating a risk thereof, he: **** (d) Creates a hazardous or physically offensive condition by any act that serves no legitimate purpose."

well successfully blocked the parade we might reach a different conclusion. He did not and his motion for directed verdict was granted.

We turn next to the more troublesome question of Sparrow's actions. As we have noted, the complaint was signed some 17 days after the parade and was signed "James T. Sparrow." The complaint is facially valid in that it charges a public offense. It is a complaint that could have been signed by any citizen of Shepherdsville.

It is elementary that:

> "[T]he terms of Section 1983 make plain two elements that are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the 'Constitution and laws' of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right 'under color of any statute, ordinance, regulation, custom or usage of any State or Territory.' This second element requires that the plaintiff show that the defendant acted 'under color of law'." *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 150, 90 S. Ct. 1598, 1604 (1970).

Since we conclude that the signing of the complaint was not an act that amounted to a misuse of power possessed by virtue of state law and made possible only because Sparrow was clothed with authority of state law, *Williams* v. *United States*, 341 U. S. 97, 71 S. Ct. 576 (1951), we determined that plaintiff cannot meet the second element of *Adickes*, *supra*. *See also*, *Kerr* v. *City of Chicago*, 424 F. 2d 1141 (7th Cir. 1970).

In *Baker* v. *McCollan*, 443 U. S. 137, 99 S. Ct. 2689 (1979), the Court wrote:

> "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of

duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. Just as '[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner,' *Estelle* v. *Gamble*, 429 U. S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251 (1976), false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official.

Having been deprived of no rights secured under the United States Constitution, respondent had no claim cognizable under § 1983." 443 U. S. at 146, 99 S. Ct. at 2695.

Our determination that neither individual defendant is liable to plaintiff under Section 1983 compels the conclusion that the defendant, City of Shepherdsville, is outside the holding in *Owen* v. *City of Independence, Missouri*, 445 U. S. 622, 100 S. Ct. 1398 (1980). There simply isn't any evidence of action taken by any representative of the City under color of law. Whether plaintiff would have had a cause of action against Sparrow for malicious prosecution or false arrest we do not decide.

CONCLUSION

For the reasons discussed above, the Court has determined that defendants' motion for directed verdict should be granted, and an appropriate Judgment has been entered this date.

January 12, 1982

(s) Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
United States District Judge

Copies to:
Counsel of record